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Federal Communications Commission
Office of Secretary

May 29, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Petition for Partial Reconsideration
CC Docket No. 92-297

Dear Mr. Caton:

On behalf of CellularVision USA, Inc. ("CVUS"), and pursuant to Section 1.429 of the Commission's Rules, enclosed please find an original and eleven (11) copies of its Petition for Partial Reconsideration filed in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Michael R. Gardner

Michael R. Gardner
Counsel for CVUS

Enclosures

No. of Copies rec'd 0+11
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED
MAY 29 1997
Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket No. 92-297
	)	

PETITION FOR PARTIAL RECONSIDERATION

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May 29, 1997

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SUMMARY

As the recognized pioneer of LMDS technology, and as the only successful entrepreneurial "small business" LMDS operator that is traded publicly, CVUS applauds the Commission's marketplace-driven approach to licensing this new technology in a manner that maximizes flexible use of the spectrum. However, in light of the substantial costs small businesses will incur, both in acquiring LMDS licenses at auction and promptly constructing, marketing and operating their systems throughout 492 vast BTAs, the government financing option adopted by the Commission in the *LMDS Second Report and Order* is inadequate to attract small business participation in the nationwide LMDS auctions. Accordingly, in order to enhance spectrum auction revenues in a stable financing environment that will ensure maximum participation by new small business entrants into the U.S. communications marketplace, CVUS urges the Commission to adopt an additional, more realistic repayment option that takes into account the special, resource-intensive characteristics of LMDS.

Specifically, the Commission should adopt a second repayment option similar to MCI's proposal submitted earlier this month to the FCC in the PCS C-Block proceeding. Under this *deferred incremental repayment plan*, a qualifying small business would begin to pay for its license (less the 25% bidding credit and 20% downpayment) in year six of the license term. Importantly, a small business would make interest payments based on the 10-year T-note rate, without a 2.5% mark-up, beginning at year six through the conclusion of the license term. Payments of

principal would commence at year seven under an incremental payment structure through year 10. In year seven the licensee will pay 5% of the outstanding principal owed, 10% in year eight, 10% in year nine, and the remaining 75% in the final year.

Adoption of CVUS' deferred incremental repayment plan will help ensure the competitive viability of LMDS entrepreneurs by allowing them to commit their limited capital resources, which otherwise would be directed to servicing license debt, to building and operating their systems during the crucial initial years of operation before a positive cash flow can be generated. If adopted by the Commission on Reconsideration, CVUS' plan will advance the pro-competitive goals of the FCC and Congress by promoting maximum participation of small businesses in LMDS auctions, and ultimately in the nationwide deployment of LMDS — a service that will provide U.S. consumers a new alternative to existing cable, telephony and data services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)))))))))))	CC Docket No. 92-297

PETITION FOR PARTIAL RECONSIDERATION

CellularVision USA, Inc.[1] ("CVUS") by its attorneys, pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider, and modify that portion of its *LMDS Second Report and Order,* FCC 97-82, 62 Fed. Reg. 23148 (April 29, 1997), in the above-referenced Rulemaking Proceeding, dealing with financial provisions designed to maximize the successful participation of entrepreneurial small businesses in the prompt nationwide deployment of LMDS.

As the recognized pioneer of LMDS technology, and as a successful entrepreneurial "small business" that went public in 1996, CVUS is confident that its recommendations regarding small business financing, if adopted by the Commission, will advance the pro-competitve goals of the FCC and Congress by providing U.S.

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[1] CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

consumers with important new alternatives to existing cable, telephony and data service providers. Moreover, implementing CVUS' proposal will maximize spectrum auction revenues in a stable financing environment that will ensure optimal participation by new small business entrants into the U.S. communications marketplace.

I. Introduction

During the past eleven years, the principals of CVUS have pioneered the development of LMDS technology. Today, CVUS is the only commercially licensed LMDS provider having been awarded a license in 1991 by the Commission to serve the 8.3 million consumers in the vast New York PMSA.[2] As a result of the tenacious commitment and vision of CVUS' founders, culminating in the recently-released *LMDS Second Report and Order*, LMDS is about to become a reality nationwide and will soon provide consumers with a low-cost, high-quality panoply of interactive video, telephony and high-speed data services. CVUS seeks to facilitate the rapid nationwide deployment of LMDS' multi-faceted new services through the successful efforts of LMDS licensees who qualify as "small businesses" under the Commission's rules.[3]

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[2] *See Hye Crest Management, Inc.*, 6 FCC Rcd 338 (1991).

[3] The Commission defined a "small business" in the *LMDS Second Report and Order* as an entity together with its controlling principals and affiliates with average gross revenues not exceeding $40 million for the three preceding years. *LMDS Second Report and Order*, FCC 97-82 at 147, ¶ 348 (released March 13, 1997).

CVUS applauds the Commission's marketplace-driven approach to licensing this new technology in a manner that maximizes flexible use of the spectrum. However, in light of the substantial costs small businesses will incur, both in acquiring LMDS licenses at auction and promptly constructing their LMDS infrastructure, the government financing option adopted by the Commission in the *LMDS Second Report and Order* is inadequate to ensure maximum small business participation in the nationwide LMDS auctions. Accordingly, CVUS requests that the Commission adopt an additional, more realistic repayment option that takes into account the special, resource-intensive characteristics of LMDS.

In the *LMDS Second Report and Order*, the Commission sought to further its statutory mandate of promoting economic opportunities for small businesses by providing qualifying entities with a 25 percent bidding credit and a ten-year installment payment plan. Under this financing plan, a qualifying small business would pay 20 percent of its winning bid prior to licensing, and the remaining 80 percent of its license over ten years at interest based on the 10-year Treasury note ("T-note") rate plus 2.5 percent, with interest-only payments for the first two years of the license term and combined interest and principal amortized over the remaining eight years. While this proposal is well-intentioned, it fails to realistically address the financing needs of small businesses who will require several years before their repayment obligations commence in order to build out their systems in a manner which promotes real competition from the new LMDS entrant.

Currently, there is marketplace uncertainty due to the shaky financial status of several PCS C-Block spectrum winners,[4] the relatively low prices recently bid for the WCS spectrum,[5] and the Commission's own suspension of PCS installment payments;[6] as a result, the capital markets required to finance LMDS entrepreneurs are understandably tentative about new wireless entities who must have the financial wherewithal and stamina to compete with major MSOs and telcos.

To address the obvious financing needs of small businesses, so that they remain financially stable sources of competition to entrenched LECs and cable companies, and to maximize revenues derived from nationwide LMDS spectrum auctions, the Commission should adopt a second repayment option similar to the proposal suggested to the Commission by MCI earlier this month in the PCS C-Block proceeding.[7] Under this plan, a qualifying small business would pay for its license (less the 25% bidding credit and 20% downpayment) through a *deferred incremental repayment plan* beginning in year six of the license term. Specifically, a small business would begin making interest payments based on the 10-year T-note rate, without a 2.5% mark-up, at year six through the end of the license term. Meanwhile,

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[4] *See* Mark Landler, *Airwave Auctions Falter as Source of Funds for U.S.*, New York Times, April 3, 1997, at A1.

[5] *See* Bryan Gruley, *FCC Auction of Airwaves Draws Weak Bidding*, Wall Street Journal, April 24, 1997, at A2.

[6] *See In the Matter of Installment Payments for PCS Licenses*, Order, DA 97-649 (released March 31, 1997).

[7] *See MCI Telecommunications Corporation*, Letter from Leonard S. Sawicki, Director FCC Affairs to William F. Caton, Acting Secretary, FCC, May 1, 1997, WT Docket No. 97-82, PP Docket No. 93-253: Part 1 Wireless Rules.

payments of principal would commence at year seven under an incremental payment structure through year 10. Accordingly, in year seven the licensee will pay 5% of the outstanding principal owed, 10% in year eight, 10% in year nine, and the remaining 75% in the final year. As explained below, this financing option will help ensure the competitive viability of LMDS entrepreneurs by allowing them to commit their limited capital resources, which otherwise would be directed to servicing license debt, to constructing, marketing and operating their systems during the crucial initial years of operation before a positive cash flow can be established.

II. Congressional Mandate Regarding Small Businesses and the Competitive Bidding Process

Both Congress and the Commission have recognized that determining the special provisions to be afforded small businesses in spectrum auctions should be accomplished on a service-specific basis.[8] In authorizing the Commission to issue licenses through the competitive bidding process, Congress directed the FCC to:

> "Promote economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, *including*

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[8] While the Commission is currently undertaking a Rulemaking that seeks to establish a schedule of installment payment plans for designated entities applicable to all future spectrum auctions, it is proposing to "retain the authority to modify payment terms on a service-specific basis." *See In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 97-82, FCC 97-60 (released February 28, 1997).

small businesses."[9]

In so doing, the Commission is required to:

> "Consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, *or other schedules or methods* that promote the objectives described in paragraph (3)(B)."[10]

Moreover, under the Commission's own rules, in adopting the definition of a "small business" and the appropriate opportunity-enhancing measures, the Commission is required to "tak[e] into consideration the characteristics and capital requirements of the particular service."[11]

In order to fulfill its statutory mandate of promoting economic opportunity for small businesses and thereby ensure that a whole new generation of entrepreneurs are able to provide LMDS' competitive wireless services, the Commission must carefully consider, as it has with other services, the unique capital-intensive characteristics of LMDS, as discussed below, and offer a more realistic financing option for eligible LMDS small business entrepreneurs.

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[9] 47 U.S.C. 309(j)(3)(B) (*emphasis added*).

[10] 47 U.S.C. 309(j)(4)(A) (*emphasis added*).

[11] 47 C.F.R. §1.2110(b)(1). For example, the Commission has defined a "small business" based on gross revenue caps of $3 and $15 million (900 MHz SMR); $15 million (this revenue cap defined a "very small business" in the broadband PCS F Block auction); and $40 million (broadband PCS C and F Block and MDS). The Commission has also in the past, as it did in LMDS, adopted a $40-$75 million category, but has not considered such entities "small businesses."

III. Likely Higher Costs of LMDS Licenses and System Build-Out

In the *LMDS Third Notice of Proposed Rulemaking*, the Commission recognized that "the cost of acquiring a [LMDS] license is likely to be higher than for other services."[12] While it is impossible to determine in advance what prices LMDS licenses will command, past auctions provide some guidance in making this valuation. In the Commission's recent Broadband PCS auctions, the Commission allocated a total of 120 MHz to the service with licenses consisting of 30 and 10 MHz of spectrum. Importantly, at the time of auction, PCS was mostly limited to mobile communications services.[13] Despite the limited bandwidth and permissible services, the PCS auctions raised over $20 billion.

For several reasons, the cost of acquiring an LMDS license could conceivably rival that of any license awarded by the FCC since it received auction authority from Congress in 1993. First, in comparison with the 30 MHz allocated to the larger PCS licenses, the Commission is allocating an unprecedented 1,150 MHz and 150 MHz to the two LMDS licenses in each BTA. This amounts, respectively, to 38 and five times the amount of spectrum allocated to this PCS license. Second, compared with the

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[12] *See Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd. 53, 122 ¶188 (1995) ("*LMDS Third NPRM*").

[13] *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd. 7700, 7712 at ¶ 23 (October 22, 1993). Fixed services are currently permitted only if ancillary to mobile operations. *See* 47 C.F.R. §24.3. However, this section was amended *after* the PCS auctions. *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd. 8965 (August 1,1996).

limited permissible services for PCS, LMDS is capable of simultaneously delivering voice, data, video, teleconferencing, telemedicine, distance learning and a host of other services which are all permitted under the Commission's LMDS rules.[14] Moreover, in the *LMDS Second Report and Order*, the Commission stated that even mobile services would be allowed with LMDS if there is support for such an allocation.[15] Finally, as the Commission itself recognized, unlike the PCS C-Block auctions where the pool of eligible bidders was limited to "entrepreneurs," i.e., entities with gross average annual revenues of less than $125 million,[16] the cost of LMDS licenses is likely to be high due to "the presence of very large companies in the markets for various LMDS services."[17] Thus, unlike the PCS C-Block auctions, as the FCC has recognized, LMDS entrepreneurs will likely be forced to bid against well-capitalized Fortune 500 companies that will presumably drive up the auction prices.

In addition, the Commission itself recognized in the *LMDS Third NPRM*, that "[LMDS] build-out costs are likely to be significant."[18] Accordingly, the Commission

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[14] *See LMDS Second Report and Order*, ¶ 207.

[15] *Id.*

[16] *See* 47 C.F.R. 24.709 (Eligibility for C-Block auction participants limited to entities with gross revenues of less than $125 million in each of last two years.).

[17] *LMDS Second Report and Order*, at ¶348. While the LMDS rules include in-region restrictions for LECs and cable companies on the 1,150 MHz license, there are no such out-of-region restrictions, nor are there restrictions placed on the 150 MHz license. Moreover, even in-region LECs and cable companies may bid on the 1,150 license if they subsequently divest the offending geographic area. *See LMDS Second Report and Order*, ¶¶ 194, 195.

[18] *LMDS Third NPRM*, ¶ 188.

adoption of a deferred repayment plan as suggested by CVUS would allow the small business LMDS licensee to focus its limited start-up capital on building out its system rather than servicing its heavy government debt. It is particularly critical to minimize the cash burden of an LMDS entrepreneur in the early years of operation because the initial cash outlays for system deployment and build-out are very substantial, as this necessarily must fund the purchase of transmitters, set top boxes, the system's backbone as well as general operational start-up costs. This *deferred incremental repayment plan* proposed by CVUS would enable the small business to meet these high start-up costs and establish a positive cash flow which could then be reinvested into continued system deployment rather than drained by license installment payments. Obviously, the promptest and most aggressive LMDS build-out advances the Commission's and Congress' goals of promoting maximum consumer choice through robust competition for entrenched cable and telco providers who will be challenged by LMDS licensees.

Given the likely costs of acquiring LMDS licenses at auction,[19] the higher costs

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[19] Some analysts cite the recent WCS auctions as evidence that spectrum value may be decreasing, however, as Chairman Hundt stated in a recent speech to the FCBA (April 30, 1997), this auction appears to be an anomaly for several reasons: In the WCS auctions potential bidders did not have sufficient time to analyze market characteristics, including demand; they did not have time to develop new technologies for new services, such as wireless Internet access; they did not have time to build alliances and consortia to develop and deploy such new technologies; they did not have time to raise the capital either to build new wireless systems or to bid on the spectrum; and finally they did not have time to cope with the allegations of interference from adjacent DARS spectrum users. *See Chairman Hundt's Speech to FCBA*, April 30, 1997.

attendant to the build-out of LMDS systems, and the fact that the Commission has defined a "small business" for LMDS auctions just as it did for PCS C-Block, i.e. capping gross revenues at $40 million, it logically follows that eligible LMDS small businesses should have been granted *more* favorable financing options than their PCS C-Block counterparts. The need for a second, more flexible installment payment plan is even more compelling in light of the current difficulties PCS C-Block licensees are facing in maintaining their interest payments to the FCC.[20] Ironically, the Commission's proposed installment payment option for LMDS small business licensees is even more onerous than the payment plan afforded small businesses under the PCS C-Block rules.

In the PCS C-Block auctions, the Commission allowed eligible small businesses to finance a full 90 percent of their license costs, requiring only a ten percent downpayment[21] as compared with the 20 percent downpayment required for LMDS small businesses. Moreover, PCS C-Block small business licensees make interest-only payments — based on the 10-Year T-note — for the first six years and interest and principal amortized over the remaining four years. This is a far more relaxed plan than the Commission is proposing for LMDS small businesses who would have to begin

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[20] *See Letter from Thomas Gutierrez et al., to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).* And See *In the Matter of Installment Payments for PCS Licenses*, DA 97-649 (released March 31, 1997) (Order by the Chief, Wireless Bureau indefinitely suspending further PCS installment payments.)

[21] 47 C.F.R. 24.711(a)(2).

making principal payments at year three with interest payments at 2.5% *above* T-note. Therefore, to maximize small business participation in the FCC's nationwide licensing of LMDS while enhancing revenues from those auctions, and to minimize the risk of default for small business LMDS licensees, the Commission should adopt a second financing option that allows a qualifying small business to pay for its license (less the 25% bidding credit and 20% downpayment) under a *deferred incremental repayment plan* beginning in year six of the license term, with accrued interest at the 10-year T-note rate commencing in year six and ramped-up principal repayment during years 7-10 of 5%/10%/10%/75%, respectively.

IV. A Second Repayment Plan for LMDS Small Businesses Serves the Public Interest

Allowing a small business to pay for its license under the *deferred incremental repayment plan* outlined above serves the public interest in several important respects. First, this financing option would effectively place small businesses on parity with larger, well capitalized businesses which presumably will seek to build out their systems as quickly as possible in order to reap the rewards of introducing new and innovative services into the marketplace. As noted above, the U.S. consumer also would be the ultimate beneficiary to the extent that the promise of LMDS is realized nationwide in a rapid and efficient manner.

Second, providing small businesses with a deferred payment plan is an optimal way to ensure full repayment to the Federal Treasury and prevent default while maximizing revenues derived from the nationwide LMDS auction. From a government budgeting standpoint, it should make little difference *when* the attendant principal and interest payments are paid to the Federal Treasury as long as they are made with accrued interest and competition and consumer choice are simultaneously advanced. Moreover, to the extent that this *deferred incremental repayment plan* enhances the financial viability of small business LMDS licensees who can attract added investment, the government is further assured that these eligible licensees will in fact be able to ultimately meet their financial obligations. Furthermore, as the Commission proposes in the *Competitive Bidding Proceeding Notice of Proposed Rulemaking*,[22] to further assure that small businesses do not default on their repayment obligations, the Commission could adopt stricter screening procedures for applicants seeking to avail themselves of bidding credits and installment payments.

V. Conclusion

In order to promote the greatest participation of small businesses in LMDS auctions and ultimately in the exciting new nationwide LMDS marketplace, the Commission must take serious note of the current realities of the capital markets — markets made tentative by troublesome publicly reported developments adversely impacting small business FCC licensees. To limit the terms of installment payments

[22] *See In the Matter of Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket 97-82, ¶ 34 (released February 28, 1997).

for LMDS small businesses to those made available in the *LMDS Second Report and Order* is simply shortsighted and out of step with the otherwise laudable flexible Commission rules for LMDS. By adopting the alternative additional approach articulated by CVUS — namely an initial 20 percent downpayment (minus the 25% bidding credit) followed by a *deferred incremental repayment plan* beginning in year six of the license term, with accrued interest at the 10-year T-note rate commencing in year six, and increasing principal repayment during years 7-10 of 5%/10%/10%/75%, respectively — the Commission will provide small businesses with flexible and realistic financing rules that are squarely in the public interest. Moreover, the Commission's adoption of this alternate *deferred incremental repayment plan* will promote competition from new small business LMDS entrepreneurial licensees who will have the financial wherewithal to make LMDS a meaningful video, voice and data alternative for U.S. consumers.

Respectfully submitted,

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By: Michael R. Gardner

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May 29, 1997

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Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of CVUS' foregoing "Petition for Partial Reconsideration" were delivered by hand, on May 29, 1997, to the following:

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